

*United States Court of Appeals
for the Second Circuit*



**APPELLANT'S
BRIEF**

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United States Court of Appeals

For the Second Circuit.

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ISRAEL DIAZ-MARTINEZ,

Defendant-Appellant.

*On Appeal From The United States District Court
For The Eastern District Of New York*

Appellant's Brief

ZUCKERBERG, SANTANGELO and MAHLER, P.C.

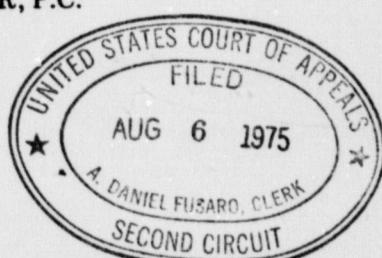
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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

ISRAEL DIAZ-MARTINEZ,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT, EASTERN DISTRICT
OF NEW YORK

PRELIMINARY STATEMENT

This is an appeal from an order denying a post-conviction application for a new trial (92)*.

The appeal herein parallels an appeal from the judgment of the United States District Court, Eastern District of New York (Chief Judge Mishler) whereby the appellant was convicted after an adverse jury finding of guilt, for a conspiracy to violate 21 U.S.C. 841(a)(1) in violation of 21 U.S.C. 846.

The appeal herein is to be heard with the appeal from the said judgment of conviction.

*()This refers to the pagination of the supplemental appendix.

STATEMENT OF THE ISSUES
PRESENTED FOR REVIEW:

Was the order of the Court below denying a motion for a new trial proper and did the appellant establish that his rights under 18 U.S.C. 3500 were not satisfied at the time of trial, and furthermore, was the appellant denied his right of confrontation or deprived of a cross examination, and his right to prepare a defense?

STATEMENT OF THE APPELLANT'S
CASE

THE THEORY UNDERLYING THE
MOTION FOR A NEW TRIAL:

At the trial in **chief**, the government as part of its case, called a New York City Police Officer named Rodriguez as a witness; as part of its main case, the government relied on an accomplice named Fiffe.

However at the trial the appellant also testified so the jury did not have just the government's evidence. When the appellant's case was completed, the government called for rebuttal a New York City Police Officer named Rodriguez. He testified that on January 17, 1973 he met the appellant at a bar and asked the appellant about a purchase of cocaine; the appellant replied that he hadn't any but expected a shipment. This is found at page 581 of the appendix already served and submitted to this Court in support of the appellant's main appeal. However to counter the rebuttal, the appellant again testified and denied the occurrence, and even denied seeing

Rodriguez, and this is found on page 599 of the said appendix in support of appellant's appeal from the judgment of conviction.

Pending the appeal from that judgment, counsel for the appellant ascertained that in regard to Rodriguez there was written material that came under the rule of disclosure under 18 U.S.C. 3500 and should have been delivered to him during the trial. Furthermore, counsel grounded the post-conviction application that such material would have enabled him to buttress his defense in that Fiffe, one of the government's main witnesses, did not occupy an alleged subordinate role in the conspiracy he testified about, but himself was a prime mover of narcotics.

THE FACTS:

The first witness called was a New York City Police Officer named Saul Rodriguez, who also testified at the trial of the appellant. He was called by counsel for the appellant. Rodriguez was a New York City Police Officer investigating narcotics. At times he worked jointly with the federal authorities. He admitted that he had contact with the federal authorities who also were conducting an investigation of the appellant and the others involved in this case. His testimony was to the effect that when the New York City authorities learned that

the federal authorities also were conducting an investigation, they exchanged information (4, 5, 19, 20, 21, 22, 23, 24). It appears that the crucial area involved in the case against the appellant was a clothing store operated by the appellant at 293 Grand Street in Brooklyn (5).

It also appeared that one Fiffe and Blanco, who were involved in the federal case against the appellant, were also tried in the State court. At the state trial, this witness testified that he transacted with them on October 26, 1972 (6, 7). It is again brought to the attention of the Court that Fiffe was one of the government's principal witnesses against the appellant. Rodriguez, at the hearing, was then confronted with his previous trial testimony to the effect that he met the appellant at a bar on January 17, 1974 (6-9). At the federal trial Rodriguez testified that prior to his meeting appellant at the bar on January 17, 1974, he saw the appellant previously at the clothing store at 293 Grand Street, November 15, 1973 (9, 10). The latter date was a corrected date for at the trial he also testified he met the appellant October 15, 1973 (8-11).

At the inception of this investigation, the New York City policeman, Rodriguez, was not aware that federal authorities were conducting a parallel investigation. Later he became aware of that (11-13). When the state authorities did become

aware of the federal intervention, they cooperated with the federal authorities (12).

During the course of the investigation this witness filed reports as to the observation and investigation of the premises. These were called "DD-5" (13, 14). At the trial in chief, this witness was asked about the reports he filed and he testified that he filed one DD-5. However at the hearing he testified that there was more than one report filed. However the witness explained that at trial when he was examined as to the reports he filed, the questions were not specific enough and therefore he testified that he only filed one DD-5 (14, 15). Asked whether government counsel knew of the reports made by this witness prior to the trial in chief, Rodriguez replied that the government counsel was "aware" of them (15, 16).

Rodriguez admitted that he made reports only as to persons who sold him narcotics, that he never made reports as to the appellant (17). Thus his testimony was:

"A. When I initially met Mr. Martinez, I did not know who he was. I did not know. I had information that he was involved, but he never committed any crimes and he never committed any overt acts to my---other than him being at the store." (17)..

When he made reports he made reports about the premises in question but these reports only referred to "major" subjects (18).

The arrest in this case was made in June 1974 (20).

Furthermore, other New York City police officers made their own reports of the investigation which involve the appellant (29, 30).

In preparation for the trial all the prosecutor asked for was whether he made out reports about the appellant (31). There was nothing in the reports that would point to the innocence of the appellant according to the witness (32).

Thereupon the Court examined the complete file of the investigation in camera (34, 35, 37, 38, 39, **Appellant's Exhibit 1 for Identification, 39**).

It next appeared that on November 15, 1973 Rodriguez purchased narcotics from Fiffe and Blanco at the store at 293 Grand Street (41). He wrote nothing in his report about the appellant (42). Nor did he ever make a report that he met the appellant (43). Furthermore, this witness had tapes from the electronic surveillance of the subjects, but none of these tapes had any conversations of the appellant (47).

The Court ruled at that phase of the hearing that there was nothing that should have been turned over to the appellant. This was after looking at the file the Court examined in camera (51).

Appellant's counsel pointed out that if he had the written material heretofore described, he could have more effectively cross examined Fiffe. Thus counsel pointed out that at the trial Fiffe testified that the appellant was the major mover in the conspiracy (55).

Later examination of Rodriguez disclosed that Fiffe and Blanco gave out the appellant's business card to this witness. Of course the appellant was not present when this was done (59).

The next witness was a federal agent named Abbott who also testified at the trial (66).

During the course of the federal investigation he was made aware that the New York City police were conducting a parallel investigation that commenced October 25, 1973 (67). He became aware of this in December 1973 (68).

During the course of the investigation the federal authorities met and discussed the investigation (69).

Abbott would have the federal and state groups investigating separate groups and subjects that were involved. However it was the state authorities that were pursuing the investigation as to the appellant (73). Further the federal agents were directed not to interfere with the state's investigation of the appellant (74).

However, as is known it was the federal authorities that arrested and prosecuted the appellant (75).

It also appeared that an informant who worked with the state authorities also worked with the federal authorities but never disclosed to the federal authorities that he was cooperating with the state (78, 79).

Abbott would also have the New York authorities having a better case against the appellant than the federal agents (79).

POINT I:

THE APPELLANT'S RIGHT TO FULLY CROSS EXAMINE RODRIGUEZ, THE GOVERNMENT'S WITNESS AT TRIAL, AND TO FURTHER DEVELOP A DEFENSE WAS PREJUDICED.

It is obvious that the fairness of a trial includes the right to counsel, that is effective counsel, the right to cross examine and the right to develop a defense. It seems however that these rights coalesce. Counsel means effective counsel. Effective counsel includes a penetrating cross examination and equally important is the right to develop a defense. Hence the role of exculpatory material to be furnished by the government and liberal discovery proceedings.

It is respectfully suggested that the rationale in Wardius v. Oregon, 412 U.S. 470 (1973) is applicable to this case, it being stated in part, on pages 473 and 474 that:

"...the ends of justice will best be served by a system of liberal discovery which gives both parties the maximum amount of information with which to prepare their cases and thereby reduces the possibility of surprise at trial. See e.g. Brennan, The Criminal Prosecution: Sporting Event or Quest for Truth? 1963 Washington U. L.Q. 279; American Bar Association Project on Standards for Criminal Justice, Relating to Discovery and Procedure Before Trial 23-43 (approved draft 1970); Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, 60 Yale L.J. 1149 (1960). The growth of such discovery devices is a salutary development which, by increasing the evidence available to both parties, enhances the fairness of the adversary system. As we recognized in Williams, nothing in the Due Process Clause precludes states from experimenting with systems of broad discovery designed to achieve these goals. 'The adversary system of trial is hardly an end in itself; it is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played.' We find ample room in that system, at least as far as 'due process' is concerned, for a rule which is designed to enhance the search for the truth in the criminal trial by ensuring both the defendant and the State ample opportunity to investigate certain facts crucial to the determination of guilt or innocence..."

In this case, there was evidence that the federal authorities originally did not seek to prosecute the appellant, leaving that job to the state. The issue is why? Furthermore, the accomplice Fiffe was not the minor figure he represented

himself to be at the trial of the appellant. For Fiffe engaged in narcotic ventures on his own and so it may have been argued by counsel before the jury that Fiffe was not the minor figure that he testified to at trial, but was a major mover himself, and had a stake in the appellant's conviction. Counsel then further arguing that Fiffe should not be believed by the jury because he misrepresented his role in narcotic trafficking.

It is put therefore that there are two issues in this case: the first issue relates to the duty of the government to submit all the reports of the witness Rodriguez under 18 U.S.C. 3500 and if the government felt that those reports were not germane, to submit them to the Court at trial, for an examination in camera, so that there could be a determination at trial rather than post-conviction.

It is respectfully submitted that whatever the rule mandated in 18 U.S.C. 3500 is, it would seem that that rule echoes the requirement of due process that the prosecutor furnish the defense with exculpatory material. See Giglio v. U.S., 405 U.S. 150 (1972). In U.S. v. Gleason, 265 F. Supp. 880 (S.D.N.Y., 1967) it was held in an opinion by Judge Frankel that the application of the Brady rule may extend to pre-trial disclosure. Judge Frankel ruled that due process

requirements of furnishing a defendant exculpatory material may extend to a pre-trial disclosure even if such disclosure may also come under the limiting provision of 18 U.S.C. 3500, it being further held that the restrictions of that act must be reconciled with the demands of due process of law.

It is respectfully suggested that a fair reading of the record indicates that the United States Attorney may have limited his questioning of Rodriguez prior to trial as to the reports made by Rodriguez. The limited questioning of Rodriguez and Rodriguez' answer however it would seem does not satisfy the requirement that the prosecutor's office occupies a quasi-judicial capacity; Berger v. U.S., 295 U.S. 78, (1934) at page 88. When Rodriguez was being questioned, his answers while perhaps technically correct, were oblique and it is submitted less than candid. Thus Rodriguez was asked whether he ever told the government prosecutor before the trial whether he was part of an investigation concerning Fiffe and the answer was that the prosecutor knew about it "now" (at the time of the post-conviction hearing). Then he was pressed as to whether originally he told this to the government prosecutor, that is before the trial, and the answer was "he was aware of it" (15).

Rodriguez was still pressed at the hearing as to whether he told the government prosecutor that there were other reports concerning all the other suspects and the answer was

requirements of furnishing a defendant exculpatory material may extend to a pre-trial disclosure even if such disclosure may also come under the limiting provision of 18 U.S.C. 3500, it being further held that the restrictions of that act must be reconciled with the demands of due process of law.

It is respectfully suggested that a fair reading of the record indicates that the United States Attorney may have limited his questioning of Rodriguez prior to trial as to the reports made by Rodriguez. The limited questioning of Rodriguez and Rodriguez' answer however it would seem does not satisfy the requirement that the prosecutor's office occupies a quasi-judicial capacity; Berger v. U.S., 295 U.S. 78, (1934) at page 88. When Rodriguez was being questioned, his answers while perhaps technically correct, were oblique and it is submitted less than candid. Thus Rodriguez was asked whether he ever told the government prosecutor before the trial whether he was part of an investigation concerning Fiffe and the answer was that the prosecutor knew about it "now" (at the time of the post-conviction hearing). Then he was pressed as to whether originally he told this to the government prosecutor, that is before the trial, and the answer was "he was aware of it" (15).

Rodriguez was still pressed at the hearing as to whether he told the government prosecutor that there were other reports concerning all the other suspects and the answer was

"I gave...any information that he requested." (16)

The balance of the questioning of this witness disclosed that this witness admitted that the prosecutor asked him only if he had information as to the appellant and whether he met the appellant, telling this witness that the appellant would be going on trial in the federal court (16).

In other words, this witness put the government in a role where the questioning of this government witness was limited as to the appellant only.

It may be that the prosecutor never thought of asking the witness, a New York City police officer, about the entire investigation. However, this witness did investigate a witness for the prosecution, Fiffe. It is not understandable how this witness was not asked anything about Fiffe. At any rate, this witness, a New York City police officer, was called to testify in a federal court as to a joint investigation involving federal and state authorities.

It is further put that this record denotes that the authorities may have been engaged in "conscious avoidance" of the whole background of this investigation, that if known and divulged to the defendant would have enabled him to add to his defense at trial.

Regretfully, after the conviction, the prosecution with ease procured the complete dossier of the investigation and it was only then that the trial judge examined it and ruled accordingly as to the claims presented in this case, which were based on Giglio v. U.S., supra, 405 U.S. 150 (1972). Furthermore, in accordance with the holding of Giglio, it would seem that since the New York City police officer was called as a government witness, and was part of an investigation that cooperated with the federal authorities, the government itself is chargeable with the knowledge of the background of this investigation, the background of Fiffe, and the reports filed by the New York City police officer.

It seems that where state authorities are aware of a federal investigation and are related to it from the vantage of the state investigation, their relationship to the federal investigation render them subject to federal law, at least to the observance of federal penal statutes. See U.S. v. Papadakis, 510 F. 2d 287, (Cir. 2d, 1975), as to the appellant Novoa. It therefore follows that the New York City police officer had an obligation to the appellant as well as to the trial court and the government prosecutor under federal law.

It is further respectfully suggested that Rodriguez should therefore be considered not only as a government witness but as an agent aiding a government prosecution.

Since the file as to the state investigation was examined in camera and it is believed has been preserved for perusal by this Court, counsel is unable to argue the contents of that file. Appellant's counsel recognizes the standards governing the disposition of a post-trial application such as this, those standards being delineated in U.S. v. Seijo, 514 F. 2d 1357, (Cir. 2d 1975), at page 1363 it being stated in regard to newly discovered evidence by a prosecutor that:

"...although those representing the Government acted in good faith, that does not conclude the question. One concern is the possible effect the evidence withheld might have had, if it had been available to the defense at the time of trial..."

On page 1364 it was further stated by this Court that:

"Where as here, there was neglect, rather than prosecutorial misconduct, a higher standard of materiality is required. In this posture, the test is 'whether there was a significant chance that this added item, developed by skilled counsel...could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction'..."

CONCLUSION:

THE JUDGMENT OF CONVICTION SHOULD
BE REVERSED.

Respectfully submitted,

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and MAHLER, P.C.
Attorneys for Appellant

ARNOLD E. WALLACH
Of Counsel on the Brief

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 6 day of Aug 1975 deponent served the within Brief upon M.L. Attorney

attorney(s) for Appellee

in this action, at 225 Cadman Plaza East
Brooklyn, N.Y.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
6 day of Aug, 1975.
William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976